

## BY-LINED ARTICLE

### Top 10 Tips for Defending Mass Torts in NJ

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New Jersey is home to many mass torts – asbestos, HRT, Ortho evra, NuvaRing, Vioxx, Fosamax, Accutane, and Bextra/Celebrex – to name a few. With plaintiffs filing numerous cases in the Garden State, it is easy to fall into the mindset that New Jersey is for plaintiffs. Do not get caught in that trap and become complacent, filing rote motions and litigating on autopilot. With the right strategy and tactics, New Jersey can be for defendants too. Here are 10 tips for defending mass torts in New Jersey:

#### 1. Stop a Mass Tort Before It Starts

Challenge the mass tort designation pursuant to Rule 4:38A. The latter states, "[t]he Supreme Court may designate a case or category of cases as a mass tort to receive centralized management in accordance with criteria and procedures promulgated by the Administrative Director of the Courts upon approval by the Court. Promulgation of the criteria and procedures will include posting in the Mass Tort Information Center on the Judiciary's Internet website ([www.judiciary.state.nj.us](http://www.judiciary.state.nj.us))." The procedures require all interested parties to be served, as well as a Notice to the Bar to appear in legal newspapers and on the Mass Tort website.

Notwithstanding the number of mass torts designated by the New Jersey Supreme Court, mass tort designation is not automatic under its Court Rules, and the supreme court has in fact denied requests for mass tort designation. Upon learning of a proposed mass tort – before a mass tort designation is issued – submit comments and objections to the classification of mass tort, in the form of a brief opposing mass tort designation. If supporting documentation and/or exhibits are necessary, include them as well.

Your objection to mass tort designation should demonstrate to the court that the pertinent factors relating to mass tort designation do not weigh in favor of such designation. The mass tort designation criteria are contained in Directive #7-09 (found on the New Jersey Mass Torts website), and include considerations such as whether the cases involve large numbers of parties, involve claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort, and have a high degree of commonality of injury or damages among plaintiffs. Further, objections and comments can be made regarding the site of the centralized management.

## **2. Make Plaintiffs Prove a Prima Facie Case**

Use a Lone Pine order to require plaintiffs to demonstrate, by a date certain, the basic facts giving rise to the plaintiffs' claim, including causation of plaintiffs' alleged injury. See *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. L. Div. Nov. 18, 1986)). A Lone Pine order requiring expert testimony on causation could very well result in cases being dismissed for failure to present a prima facie case, stopping needless litigation expenses on frivolous claims. A Lone Pine order is also a way to filter potential plaintiffs and save your client the time and cost of needless discovery in cases in which a plaintiff may not have even been exposed to the product in question or may not have an injury. The Lone Pine order allows you to see what claims and cases are viable before engaging in expensive full-blown discovery practice.

## **3. Science Matters**

Typically, the science is critically important in mass tort cases. Line up experts and understand the science early on, using it from the outset to develop and hone your case strategy. If you do not utilize the applicable science in your case from the beginning, you may be missing tactical opportunities for the defense of the case. On a more practical level, it may be extremely time-consuming to find the appropriate expert for your cases, or there may be few top-flight experts in the field; finding out what information and/or records your experts need also is important. These factors weigh in favor of starting on expert witness issues at an early juncture, in order to give your client the best opportunity to obtain the best expert and all pertinent materials (which may or may not be available as more time passes).

## **4. Think Outside New Jersey**

Consider a forum non conveniens motion. If you have a persuasive argument that you as a defendant lack a connection to New Jersey, and the plaintiff is from out of state, move early to limit the scope of discovery as to forum non conveniens with expedited deadlines. This allows you to explore and develop the necessary facts for a successful forum non conveniens motion, without having completed full discovery (which could arguably make your forum non conveniens motion moot). See, e.g., *Kurzke v. Nissan Motor Corp.*, 164 N.J. 159, 168 (2000). Moreover, the closer to trial you get, the less inclined a judge may be to grant your motion – and you may have issues regarding another available forum.

## **5. Candor and Collegiality Count**

Candor with the court is of the utmost importance, as is collegiality with opposing counsel and your cocounsel. While this is true just about everywhere (at least as to candor), this principle is particularly magnified in a New Jersey mass tort, in which the Coordinating Judge will be omnipresent at (often monthly) Case Management Conferences, telephone conference calls, hearings, and trials. Being anything other than completely forthcoming with the court will not only damage your personal reputation, but also likely undermine the effectiveness of your arguments to the court as well as the court's perception of your client.

## **6. Pick Your Battles Wisely**

This is the corollary to Number Five above. Make informed judgments on what are really important issues. As noted above, the Coordinating Judge will be omnipresent. Decisions to quibble over minutiae that are subject to amicable resolution will not impress the judge.

## **7. Preserve, Preserve, Preserve**

If you believe you have valid arguments, do not stop filing motions just because the trial court continues to deny them. Preserve issues for appeal, and when the opportunity arises, bring the appeal. Timidity has no place in advocacy, particularly in New Jersey mass tort litigation. New Jersey appellate courts have recently issued a number of decisions that are notable for defendants. Through a successful appeal, you may create positive precedential opinions to be applied in future cases.

## **8. Think Globally**

Internally, prepare your office for the number of cases that will be filed, and start your organization early. The cases may come in slowly at first but will multiply quickly, and being prepared for this ahead of time will ensure that you are on top of everything. Consider hiring a vendor for records collection and/or medical records analysis and summaries to reduce the client's records-related costs.

Externally, do not just attend Case Management Conferences (CMC) – participate in them. Volunteer to take on a task, and think about the longterm impacts of any decisions made at the CMC. What may work in one case – or even several cases – could become a nightmare when dealing with mass torts. Think through the best ways to streamline discovery procedures, create master pleadings and/or discovery forms, and establish reasonable timelines. Set responsibilities for both sides, and make sure that they are clear and practical. If there is a discovery dispute over these responsibilities, try to work with opposing counsel to decide them before going to the Judge (see Number 10 below); similarly, think about whether the issue is important enough to raise with the Court (see Numbers Six and Seven above).

## **9. Act Locally: Get and Use Local Counsel**

At a minimum, you will need someone to sponsor your pro hac vice admissions if you are not licensed in the Garden State. More importantly, local counsel will know how the court operates. Also, effective use of local counsel will enable your client to minimize excessive travel costs and expenses for proceedings occurring in New Jersey, which can be handled by local counsel.

## **10. Play Nice**

You will be spending a lot of time with co-counsel and opposing counsel, as well as the Coordinating Judge. How you handle often hotly debated topics, such as production of documents and issues of privilege, can affect the future course of litigation. Dealing above-board, being respectful, and extending professional courtesies can make for a collegial relationship with opposing counsel that can continue through the mass tort litigation. From your client's standpoint, this will decrease the cost of litigation by eliminating and avoiding unnecessary disputes and/or motion practice. This is not to suggest that you should ever stop advocating for your client's interests; rather, agree to disagree respectfully. The litigation will move more smoothly and more professionally, which will likely lead to cost savings and optimal results for your client.

## Conclusion

Hopefully, these 10 tips will make the task of defending a New Jersey mass tort action less daunting and less costly for your clients. With diligent and prudent lawyering, and a focus on collegiality and candor, defense counsel can advance client interests more effectively and costefficiently, and increase the likelihood of a favorable outcome.

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